SUPREME COURT, U.S.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1966

No. ~~800~~ 15

STELLA HUGHES, *Petitioner*,

v.

STATE OF WASHINGTON, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The oral opinion of the Superior Court of the State of Washington for Pacific County (R. 22-29) is unreported but appears in the Appendix to Petition for Certiorari at pages 29-36. The opinion of the Supreme Court of the State of Washington and the dissenting opinion (App. to Pet. 59-92; R. 53-83) are reported at 67 Wash. Dec. 2d (Adv. Shts.) 787, 410 P.2d 20.

QUESTIONS PRESENTED

1. Whether the State of Washington by its constitution may abolish an upland owner's common law riparian right to acquire future title to adjoining tidelands by accretion where title to the upland owner's property is deraigned from a United States patent issued prior to statehood?

2. Whether the designation by the Washington Constitution of the *line of ordinary high tide* as the boundary of tidelands (rather than the line of mean high tide as defined by the U. S. Coast & Geodetic Survey) is invalid as to tidelands adjoining upland property, title of which is deraigned from a United States patent issued prior to statehood?

ARGUMENT

I

The State of Washington believes that the decision of the Supreme Court of the State of Washington on the first question involves no substantial federal question and is so manifestly correct that no further review is appropriate.

Article 17, section 1, of the Washington Constitution operates to abolish all common law riparian rights of lands bordering upon navigable waters. *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539 (1891); *Brace & Hergert Mill Co. v. State*, 49 Wash. 326, 331, 95 Pac. 278, 280 (1908), and cases cited; *State v. Sturtevant*, 76 Wash. 158, 163, 135 Pac. 1035, 1037 (1913), and cases cited; *Grill v. Meydenbauer Bay Yacht Club*, 61 Wn.2d 432, 435, 378 P.2d

423, 424-25 (1963). So well established is this rule that Mr. Justice Brandeis noted its existence for this court in *Port of Seattle v. Oregon & Washington R.R.*, 255 U.S. 56 (1921).

Thus, under the doctrine of these cases, the riparian rights of wharfage, ferriage, access, and future[1] accretions (rights ordinarily accorded by the common law to the owner abutting navigable water) are not rights good as against the State of Washington's title to tidelands.[2] There is no infirmity in this Washington doctrine because the riparian owner can trace his title back to a federal patent. This court long ago ruled, *Water Power Co. v. Water Comm'rs*, 168 U.S. 349, 363 (1897):

> It does not impair the efficacy of the grant or the use and enjoyment of the property by the grantee to hold that riparian rights are to be decided by the state courts, inasmuch as the grant, if by the Federal Government, has been held in the cases already cited, not to include title over navigable waters within or bound by the States.

Nor can the Washington doctrine on accretions be seriously challenged on any other ground. *Western Pac. Ry. v. Southern Pac. Co.*, 151 Fed. 376, 400 (9th Cir. 1907), sustaining a California statute,[3] well expresses our position on this point:

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[1]The state makes no claim to title to accreted lands which vested *prior* to statehood.

As a corollary to the Washington rule, the state acquires no title to uplands by erosion. Washougal Transp. Co. v. Dalles, Etc., Nav. Co., 27 Wash. 490, 68 Pac. 74 (1902).

[2]Black's Pomeroy on Water Rights 534-40 (1893).

[3]Spanish civil law precedents for the California statute and the Washington doctrine on accretion are found in Ker v. Couden, 223 U. S. 268, 278-79 (1911), and Zeller v. Yacht Club, 34 La. Ann. 837 (1882) (only proprietors on rivers and streams could acquire title by accretion).

> [T]he decision in *Shively v. Bowlby*, 152 U.S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide land or submerged land in front of a riparian proprietor, and thus deprive him of the right to future accretion, what tenable ground is there for saying that the state may not by a statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the sea could not be extended over the lands then held by the state in trust for the public by virtue of any accretion that might thereafter be deposited thereon?

The only arguable limit on the Washington accretion doctrine is the ruling of the U. S. Court of Appeals for the Ninth Circuit, *United States v. Washington*, 294 F.2d 830 (1961), *cert. denied*, 369 U.S. 817 (1962), holding that the Washington modification of the common law did not apply to lands owned by the United States and held in trust for an Indian, Samson Johns of the Quinault Tribe. This issue is not before the court in this case, however. Here the government parted with title to the property in question by a pre-statehood patent.

II

As to the second question presented, the Supreme Court of the State of Washington was also right to apply the Washington constitutional definition as to the limits of tidelands even though title to the adjoining uplands was deraigned from the United States under a pre-statehood patent. The court was not bound to limit the state's constitutional claim to tidelands to those lying below the tidal datum plane of mean high tide as defined by the U. S. Coast & Geodetic Survey.

Under the Washington Constitution, as interpreted in this case and in the past,[1] the federal court rule for dividing tidelands from uplands, as it existed at the time Washington became a state, *San Francisco v. Le Roy*, 138 U.S. 656, 671-72 (1891); *cf. Shively v. Bowlby*, 152 U.S. 1, 57 (1894), was adopted as state law, thus making the state rule as to tidelands the same as the state rule for dividing lakebed from uplands, *Austin v. City of Bellingham*, 69 Wash. 677, 680-81, 126 Pac. 59, 61 (1912), and riverbed from uplands, *Washougal Transp. Co. v. Dalles, Etc., Nav. Co.*, 27 Wash. 490, 497, 68 Pac. 74, 77 (1902).

In the present case, where the state tidelands adjoin uplands patented prior to statehood by the federal government, federal law does not call for the nullification of state law; federal law incorporates

[1] Harkins v. Del Pozzi, 50 Wn.2d 237, 310 P.2d 532 (1957); Shelton Logging Co. v. Gosser, 26 Wash. 126, 66 Pac. 151 (1901).

state law where no contrary rule is demanded by the federal patent itself or by any federal statute or treaty. *Oklahoma v. Texas*, 258 U.S. 574, 594-95 (1922); *United States v. Oregon*, 295 U.S. 1, 27 (1935). *Cf. Wallis v. Pan American Petroleum Corp.*, 384 U.S. 63 (1966). The doctrine of *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943), and similar cases,[5] does not call for federal court nullification of the state constitutional rule. Our federal system does not permit federal courts to judicially refashion or disregard state law in the absence of compelling federal interests. See, *e.g.*, *United States v. Yazell*, 382 U.S. 341 (1966). Petitioners here point to no compelling interest to be served by nullifying state law and substituting federal "common law" fashioned by this court for the determination of the boundary of state-owned tidelands.

Nothing said in *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), requires a reversal of the judgment in this case when that case is properly understood. Our briefs before the Washington Supreme Court set out the state's explanation in detail.[7] Here we pause only to point out that *Borax* was decided prior to *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), at a time when the federal courts were still reshaping judge-made law of the states. Thus *Borax* must be

[4] See, generally, Miskin, *The Variousness of "Federal Law:" Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957).

[5] *E.g.*, United States v. Allegheny County, 322 U.S. 174 (1944); D'Oench, Duhme & Co. v. Federal Deposit Ins. Corp., 315 U.S. 447 (1942).

[7] Brief of Appellant (R. 84) 65-70 (not reprinted in App. to Pet.); Reply Brief of Appellant (R. 86) 8-12 (reprinted in App. to Pet. 55-58).

considered as a ruling on California law. Nonetheless, since it can reasonably be argued that the U. S. Court of Appeals for the Ninth Circuit has construed the case to the contrary, *United States v. Washington*, 294 F.2d 830 (1961), *cert. denied*, 369 U. S. 817 (1962), there is some justification for review of the second question stated above.

III

The petitioner has urged invasion of Fifth and Fourteenth Amendment rights as grounds for review. Petition 8, 21-22. We find no merit in these contentions for the reasons set out above, but in any event these issues are not appropriate for review because they were not raised, considered, nor decided by the trial or appellate courts below.

Conclusion

For the foregoing reasons it is respectfully submitted that the petition for writ of certiorari be denied. However, if the court believes that important federal-state interests will be advanced by review of this case in the light of *Borax, Ltd. v. Los Angeles*, 296 U.S. 10 (1935), we believe the grant of certiorari should be limited to the second question stated above.

Respectfully submitted,

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September 1966